Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-132-95
KL REKHRAJ JC
11 MARCH 1996

Civil Procedure *— Pleadings — Fraud — Whether particulars of fraud had been specifically pleaded — Whether general assertion of fraud sufficient*

Contract *— Guarantee — Performance guarantee — Different from contract of guarantee — Stringent form of contract — Third party providing indemnity to cover issuer of performance guarantee — Effect of third party's countermand — Whether third party liable to full indemnity for claims arising out of payment on performance guarantee*

Contract *— Non est factum — Negligence — Want of care on part of defendants in signing documents — Whether plea of non est factum can be entertained*

The plaintiffs issued two insurance guarantees in favour of Paya Kamunting Development Sdn Bhd ('the principal'), at the request of the contractor, Abama Sdn Bhd, and the defendants. The defendants acted as guarantors, undertaking to indemnify the plaintiffs should the contractor fail to carry out the required works under the contract between the principal and the contractor. The defendants executed two letters of indemnity in favour of the plaintiffs, undertaking to keep them indemnified against all claims and demands arising out of the guarantees. Subsequently, there was a breach of the contract by the contractor. The principal wrote to the plaintiffs informing them that if the contractor failed to remedy the breach, their guarantees shall be called in. On being informed by the plaintiffs that they intended to settle the principal's claim made under the insurance guarantees and to recover the full sum from the defendants, the defendants countermanded the payment payable under the letter of guarantee for the reason that they were no longer under any obligaton to meet the payments in the face of breach of the contract on the part of the principal. The plaintiffs then refused the payment to the principal because of the defendants' countermand. The principal issued a writ against the plaintiffs to enforce the guarantees and were granted judgment. The plaintiffs claimed against the defendants under the letters of indemnity for the payment made by them to the principal under the order of the court. The senior assistant registrar ('the SAR') dismissed the plaintiffs' application for summary judgment. The plaintiffs appealed. In their defence, the second and third defendants alleged that: (i) the letters of indemnity were signed in blank upon the representations of the first defendant; and (ii) a fraud had been perpetrated upon them by the contractor's agent and the plaintiffs' agent acting in collusion.

Held, allowing the plaintiffs' appeal:

(1) The plea of non est factum is not available in favour of a person who has shown himself to be negligent. He has only himself to blame for signing the blank guarantee forms (see p 352D–E); *UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278, *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 and *Saunders v Anglia Building Society* [1971] AC 1004 followed.

(2) The plea of fraud has to be specifically pleaded and particularized as required under O 18 r 12(1)(a) and (b) of the Rules of the High Court. The allegation of fraud here has been made only by general assertion against the first defendant and stands totally mute against the plaintiffs. It thus cannot be said that the representations, when made, were that of the plaintiffs, before or at the time the defendants signed the letters of indemnity (see pp 352G–353B).

(3) The plaintiffs had issued a performance guarantee, which is a stringent form of contract under s 77 of the Contracts Act 1950 ('the Act'). It is not a contract of guarantee under s 79 of the Act which requires strict construction so that no liability is imposed on the surety which is not clearly covered by the terms of the guarantee (see p 353F–H).

(4) The personal liability to pay under the performance guarantee crystallizes as soon as the first demand is made but here the defendants countermanded against payment and the plaintiffs were forced to pay under an order of court. The plaintiffs are now just seeking for themselves the equitable right to full indemnity or restitutionary reimbursement which they are no doubt absolutely entitled to, under s 70 of the Act (see p 353I–354A).

[Bahasa Malaysia Summary

Plaintiff telah mengisukan dua gerenti insuran memihak kepada Paya Kamunting Development Sdn Bhd ('prinsipal') atas permintaan kontraktor, Abama Sdn Bhd, dan defendan. Defendan telah bertindak sebagai penggerenti, di mana mereka telah mengakujanji untuk menanggung rugi plaintif jikalau kontraktor gagal menyelesaikan kerja-kerja yang perlu di bawah kontrak di antara prinsipal dan kontraktor. Defendan telah melaksanakan dua surat tanggung rugi memihak kepada plaintif, mengakujanji untuk menanggung rugi plaintif terhadap semua tuntutan dan permintaan yang berbangkit daripada gerenti itu. Kemudiannya, terdapat pelanggaran kontrak oleh kontraktor. Prinsipal telah menulis kepada plaintif untuk memberitahu mereka bahawa jikalau kontraktor gagal memperbaiki pelanggaran tersebut, maka tuntutan akan dibuat atas gerenti mereka. Setelah diberitahu oleh plaintif bahawa mereka berniat menyelesaikan tuntutan prinsipal yang dibuat di bawah gerenti insuran dan mendapat

kembali jumlah yang penuh daripada defendan, maka defendan telah membatalkan bayaran yang harus dibayar di bawah surat gerenti atas sebab bahawa mereka tidak lagi mempunyai tugas untuk membuat bayaran kerana berlakunya pelanggaran kontrak oleh prinsipal. Plaintif kemudiannya telah enggan membuat bayaran kepada prinsipal kerana pembatalan yang dibuat oleh defendan. Prinsipal selepas itu telah mengisukan writ terhadap plaintif untuk menguatkuasakan gerenti dan mereka telah diberikan penghakiman. Plaintif kemudian telah menuntut terhadap defendan di bawah surat tanggung rugi untuk bayaran yang dibuat oleh mereka kepada prinsipal di bawah perintah mahkamah. Penolong kanan pendaftar ('PKP') telah menolak permohonan plaintif untuk penghakiman terus. Plaintif telah merayu. Dalam pembelaan mereka, defendan-defendan kedua dan ketiga telah mendakwa bahawa: (i) surat tanggung rugi itu telah ditandatangani atas borang yang kosong berdasarkan representasi yang dibuat oleh defendan pertama; dan (ii) fraud telah dilakukan ke atas mereka oleh ejen kontraktor dan ejen plaintif yang telah berpakat sulit.

Diputuskan, membenarkan rayuan plaintif:

(1) Hujahan non est factum tidak dapat digunakan oleh orang yang telah menunjukkan bahawa ianya telah cuai. Dia harus menyalahkan diri sendiri kerana telah menandatangani borang gerenti yang kosong (lihat ms 352D–E); *UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278, *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 dan *Saunders v Anglia Building Society* [1971] AC 1004 diikut.

(2) Hujahan fraud hendaklah dijadikan pliding secara tertentu dan dibutirkan seperti yang diperlukan oleh A 18 k 12(1)(a) dan (b) Kaedah-Kaedah Mahkamah Tinggi 1980. Dakwaan fraud di sini telah dibuat melalui pengataan am terhadap defendan pertama dan ianya adalah senyap terhadap plaintif. Maka, tidak boleh dikatakan bahawa representasi itu, bila dibuat, merupakan representasi plaintif, sebelum ataupun semasa defendan menandatangani surat tanggung rugiitu (lihat ms 352G–353B).

(3) Plaintif telah mengisukan satu gerenti pelaksanaan, yang merupakan jenis kontrak yang ketat di bawah s 77 Akta Kontrak 1950 ('Akta tersebut'). Ia bukannya kontrak gerenti di bawah s 79 Akta tersebut yang memerlukan tafsiran yang ketat supaya tidak ada tanggungan yang dikenakan atas penjamin yang tidak diliputi dengan jelas oleh terma-terma gerenti itu (lihat ms 353F–H).

(4) Tanggungan bayaran perseorangan di bawah gerenti pelaksanaan akan dibentuk sebaik sahaja permintaan pertama dibuat tetapi di sini, defendan telah membatalkan bayaran dan plaintif telah dipaksa membayar di bawah perintah mahkamah. Plaintif sekarang sedang menuntut untuk diri mereka sendiri, hak ekuiti untuk tanggung rugi yang penuh ataupun bayaran semula restitusi yang

mereka, tanpa sebarang keraguan, mempunyai hak di bawah s 70 Akta tersebut (lihat ms 353I–354A).]

Notes

For cases on pleadings based on fraud, see 2 *Mallal's Digest* (4th Ed 1994 Reissue), paras 2585–2586.

For cases on non est factum, see 3 *Mallal's Digest* (4th Ed 1994 Reissue), paras 1917–1924.

For a case on performance guarantees, see 3 *Mallal's Digest* (4th Ed 1994 Reissue), para 1709.

Cases referred to

Chai Then Song v Malaysan United Finance Bhd [1993] 2 CLJ 640

Crawford v Gilmore LR IR 238

European Asian Bank AG v Punjab and Sind Bank [1983] 2 All ER 508

Saunders v Anglia Building Society [1971] AC 1004

UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor [1989] 2 CLJ 1278

Verrall v Great Yarmouth Borough Council [1980] 1 All ER 839, [1981] 1 QB 202

Legislation referred to

Contracts Act 1950 ss 70, 77, 79

Rules of the High Court 1980 O 14, O 18 r 12(1)(a), (b)

S Sivaneindiren (*Cheah, Teh & Su*) for the plaintiffs.

S Periasamy (*Radzi Sheikh Ahmad, Peri & Saini*) for the defendants.

KL Rekhraj JC: This is an appeal against the decision of the learned senior assistant registrar ('the SAR'), dismissing the plaintiffs' O 14 application for summary judgment.

Facts

The plaintiffs had issued in favour of Paya Kamunting Development Sdn Bhd ('the principal') two insurance guarantees numbered B789DA000018 and B789DA000019 ('the guarantees') both dated 15 February 1989 against the request of the contractor, Abama Sdn Bhd, and the defendants, as guarantors undertaking to indemnify. It is important to set out herein the wordings of the insurance guarantee issued by the plaintiffs to construe later in the decision; as to whether it is a contract of guarantee or a contract of indemnity (performance guarantee).

The insurance guarantee addressed to the principal reads as follows:

To Paya Kamunting Development Sdn Bhd

A As requested by the contractor, Abama Sdn Bhd, ... we hereby guarantee .... required for the due performance of the covenant of their contract with Paya Kamunting Development Sdn Bhd ('the principal') ... shall become payable by us in the event of the contractor (unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute
B the contract or commit any breach of his obligations thereunder, provided that we be given notice of the contractor's failure in performing the said covenants and that we be given prior opportunity to remedy the contractor's said failure to carry out obligations required of the contractor in performing the said covenants.

This guarantee is valid from 15 February 1989 to 14 February 1990. All
C claims, if any, in respect of this guarantee have to be made during the validity period of this guarantee. Where there is no claim made on the aforesaid date, then all our liabilities and obligations under this guarantee shall be absolved.

The abovesaid letter of insurance guarantee was issued by the plaintiffs in
D consideration of and at the request of the defendants made by the execution of two separate *letters of indemnity* both dated 27 January 1989 (hereinafter called 'the letters of indemnity') and which letters of indemnity read:

To Malaysian Assurance Alliance Bhd (the plaintiffs herein)

Letter of Indemnity

E

In consideration of your obtaining/providing at our request and on behalf of Abama Sdn Bhd ('the contractor'), [the] letter of guarantee in favour of Paya Kamunting Development Sdn Bhd ('the principal') in the sum of ... ('the guarantee') being earnest money/security deposit required by the principal to cover the due performance of the contract pursuant to a tender/
F contract ... we the contractor ('the guarantors') hereby jointly and severally undertake and agree:

(1) at all times hereinafter to keep you and your assigns and successors in title indemnified against any and all consequences and any and all loss or damage whatsoever which may arise or result from or which you may sustain by reason of your issuing the said guarantee.

G

(2) at all times hereafter to keep you and your assigns and successors in title indemnified against any and all losses, costs, damages, expenses, demands and payments which you may suffer, sustain or be required to make and upon your request to appear and defend at my/our cost and expense, any action which may be commenced against you or incurred by you in relation to your issuing such guarantee.

H

(3) ...

(4) you are at liberty without reference to me/us to pay or compromise ....

(5) a statement from you as to the amount of our liability to you shall be accepted by me/us as being final and conclusive evidence that such amount or amounts are due by me/us ... and I/we will make payment
I thereof within seven days from the date of such demand by you for the sum under the guarantee and to repay to you all such payments made by you under the guarantee .... and to pay you interest thereon at 12% per annum ... as long as such money remain unpaid.

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) you may enforce this guarantee against me/us at any time jointly or severally ... .

(12) ...

(13) ...

(14) ...

(15) you shall be entitled in your absolute discretion to demand from me/us at any time during the continuance of the said guarantee and/or until the same is discharged ... full margin in cash for the amount guaranteed by you ....

(16) ...

(17) if the contractor shall in any respect fail to execute the contract or commit any breach ... I/we will indemnify you for all consequences any loss ... which you may sustain by reason of such failure or breach

(18) we shall not be discharged or released from this guarantee by any arrangement ... with or without our consent ... whether as to payment, time, performance or otherwise.

Signed by the contractor
and the three defendants.

The purported works under the contract, undertaken by the contractor for the principal, progressed slowly and the principal's consultants wrote to the contractor by AR registered letter dated 26 July 1989:

> You are directed to refer to our letters dated 21 March 1989, 15 May 1989, 30 May 1989, and we are placing on record and remind[ing] you that since 26 April 1989, no works have been carried out on [the] site. It is also recorded that your work is now approximately 18 weeks behind schedule ... please let us know when you inten[d] to re-commence work?

This reminder letter was followed by a further letter dated 8 August and 27 September 1989 from the principal to the contractor reminding them of a breach on their part; and giving them 14 days from the letter dated 27 September 1989 to carry out such works.

On 27 September 1989, the principal also wrote to the plaintiffs putting them on equal notice to the effect that the contractor had breached the contract and if the contractor failed to remedy the breach within the next 14 days, their guarantee shall be called in.

On 16 January 1990, the plaintiffs wrote to the contractor and to the defendants on these lines:

> Re Insurance Guarantee Nos B789DA000018 and B789DA000019 issued in favour of Paya Kamunting Development Sdn Bhd.

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> We refer to the above matter and enclose herewith a letter dated 5 January 1990 from Paya Kamunting Development Sdn Bhd which is self explanatory for your perusal and attention.
>
> Please take note that we shall proceed to settle the claims made under our insurance guarantee Nos B789DA000018/19 in the sum of RM69,460 and RM225,000 respectively to Paya Kamunting Development Sdn Bhd within (14) fourteen days from the date hereof *unless precluded by a court order.*
>
> Please further take note that in the event the claims are paid or settled by us, we shall proceed with whatever action deem[ed] necessary to recover the full sum from you as well as the guarantors pursuant to your letter of indemnity which provides inter alia, that you will undertake to keep us fully and completely indemnified at all times from and against all claims and demands arising out of the guarantees.
>
> In view of the urgency of this matter, we would urge you to give your immediate actions.

The defendants by their respective letters dated 9 and 12 March 1990 addressed to the plaintiffs, *countermanded* the payment payable under the letters of guarantee for the reason that they were no longer under any obligation to meet the payments in the face of breach of the contract on the part of the principal, and putting the plaintiffs upon notice that the defendants will hold the plaintiffs responsible should any settlement or payment be made by the plaintiffs to the principal.

The plaintiffs then refused the payment to the principal because of the countermand; and the principal issued a writ against the plaintiffs to enforce the guarantee vide D4–22–588–90 in the Kuala Lumpur High Court on 5 April 1990. The defendants tried to intervene in the said suit but their intervener action was disallowed by the High Court and upon appeal, it was upheld by the Supreme Court of Malaysia vide Civil Appeal No 03–97–91.

On 30 September 1991, the SAR granted summary judgment in favour of the principal against the plaintiffs in the sum of RM294,460 with interest thereon at the rate of 8% per annum from 19 January 1990 until date of full payment and costs ('the said judgment').

As a consequence of the said judgment taken against the plaintiffs herein, to avoid any execution of the judgment upon them, on 19 November 1991, the plaintiffs made the payment to the principal in the sum of RM337,997.47 in full settlement on the judgment and RM8,895.50 being the taxed costs awarded to the principal.

The plaintiffs herein now claim against the three defendants jointly and severally the full indemnity against the payment made by them to the principal under the order of the court. Pursuant to that direction, the plaintiffs, by their letter dated 4 January 1995 made a demand on the defendant for the sum of RM365,553.97, and upon default being made, proceeded with the issuance of a writ and a summons in chambers for summary judgment.

The second and third defendants by their joint affidavit affirmed on 30 May 1995, in opposition to the summary judgment, admitted to the signing of the letters of indemnity:

(i) but alleged that the said letters of indemnity were signed in blank *upon the request and representations made by the first named defendant* to the effect that the said letters of indemnity shall also be signed subsequently by Tan Sri Ibrahim Ali and Tengku Azman;

(ii) that the date 27 January 1989 as shown on the letter of indemnity could not be the date when they signed, but could be a date after 15 January 1989 or in the month of February 1989;

(iii) that they now realize that *a fraud* has been perpetrated upon them by an agent of the contractor (Abama) and the agent of the plaintiffs acting in collusion and connivance;

(iv) that the said letters of indemnity were signed *after* the plaintiffs had issued the guarantees in favour of the principal and as such were invalid, null and void. (However, upon the perusal of the letters of guarantees issued by the plaintiffs, it is shown to carry the date of 15 February 1989, ie after 27 January 1989, the date when the letters of indemnity were issued. Therefore any suggestion of past consideration or no consideration is a non-issue.).

On the point of *signing the documents in blank*, there are numerous authorities, more particularly *UMW Industries (1985) Sdn Bhd v Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278, where the High Court held:

> the *plea of non est factum does not avail* in favour of a person who has shown himself to be negligent. He has only himself to blame for signing the blank guarantee forms.

Again in the case of *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640, the High Court totally adopted the principle of the above case. It was also held in the case of *Saunders v Anglia Building Society* [1971] AC 1004 that:

> A person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor.

Lord Wilberforce in the aforesaid case went further to say:

> I would add that the onus of proof in this matter rests upon him to prove that he acted carefully, and not upon the third party to prove contrary.

On the plea of *fraud, it has to be specifically pleaded and particularized as required under O 18 r 12(1)(a) and (b) of the Rules of the High Court which provides*:

> Every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:

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> (a) particulars of any misrepresentation, *fraud*, breach of trust ... ; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice; fraudulent intention ... particulars of the facts on which the party relies.

Here the allegation of fraud has been made only by a general assertion
B against the first defendant and stands totally mute against the plaintiffs. The conduct complained of therefore cannot be the conduct of the plaintiffs by any extension of the interpretation; nor can it be said that the plaintiffs knew of such a fraud or that the representations when made were that of the plaintiffs before or at the time the defendants signed the said letters of
C indemnity.

On an O 14 application, all that the defendant needs to show is that there is a triable issue as to a matter of fact or any real difficulty as to matter of law (*Crawford v Gilmore* LR IR 238); and if and when there was a point of law, once it is understood and the court on being satisfied that it was really unarguable, would give judgment; see *European Asian Bank*
D *AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 516 where it was held:

> ... this court will not hesitate, in an appropriate case, to decide questions of law under O 14, even if the question of law, at first blush, appears to be of some complexity and takes a little longer time to understand.

E To refuse to decide a case which raises a clear cut issue may offend the whole purpose of O 14, especially when full arguments have been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see *Verrall v Great*
F *Yarmouth BC* [1980] 1 All ER 839 at pp 845–846, [1981] 1 QB 202 at pp 215 and 218, per Lord Denning MR and Roskill LJ).

The plaintiffs herein had issued what can be called a *performance guarantee*, more commonly called a *performance bond*, under which the plaintiff had contractually undertaken to pay to the principal against the
G demand, the amounts stated under the guarantee, upon the occurrence of the default by the contractor in their non-fulfillment of the contractual obligations undertaken. A performance guarantee (performance bond) is a stringent form of contract of indemnity as provided for under s 77 of the Contracts Act 1950 ('the Act') which reads:

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> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a 'contract of indemnity'.

They are *not contracts of guarantee* under s 79 of the Act which requires strict construction, so that no liability is imposed on the surety which is not clearly covered by the terms of the guarantee.

I

Further s 77 read together with s 78 of the Act does not provide the plaintiffs, under the performance guarantee, with *any right to plead the defence of the 'usual equities'* against the principal which otherwise would

have been available in ordinary contracts of guarantees. The personal liability to pay under the performance guarantee crystallizes as soon as the first demand is made, but here the defendants countermanded against payment and the plaintiffs were forced to pay under an order of court taken against them in the Civil Suit No D4–22–588–90. The plaintiffs are now just seeking for themselves the equitable right to *full indemnity* or *restitutionary reimbursement* which they are no doubt absolutely entitled to under s 70 of the Act and as such, ought not to be denied a judgment summarily.

I accordingly allow the appeal against the decision of SAR with costs which was agreed upon by both counsels at RM8,000 in lieu of taxation.

Appeal allowed.

Reported by Ng Sheau Jiuan